SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 00-319

Supreme Court No.: SC00-2510

RE: JOSEPH P. BAKER
_____/

RESPONSE TO ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

The Judicial Qualifications Commission will be referred to as the JQC. Judge Joseph P. Baker will be referred to as Judge Baker. Reference to each of the pleadings and documents in the proceeding will be by name with page numbers. References to the trial transcript of the jury trial of *Universal Business Systems v. Disney Vacation Club* in which Judge Baker presided will be with the symbol "T," and references to the transcript of the hearing held by the Hearing Panel of the JQC on April 23, 2001, will be with the symbol "HT."

STATEMENT OF THE CASE AND FACTS

Judge Baker's Research and Disclosure During Trial

While he was presiding in a jury trial of *Universal Business Systems (UBS) v. Disney Vacation Club (DVC),* Judge Baker advised counsel that he would, and did extensive research on several occasions during the trial. (T 390/15-392/2, 886/1-926/14, 890/22-25, 989/6-14, 921/9-923/5, 925/2-4) After the third day of jury trial, Judge Baker had typed by himself a written draft of his thoughts reflecting his research. It is dated May 13, 1999. On the next day, Friday, May 14, 1999, before adjourning the trial for a three-day weekend, Judge Baker delivered copies of his eight-page draft to counsel in open court.

Judge Baker's dialogues with counsel as well as his draft delivered to them on May 14 centered around Judge Baker's concern with the proper legal method of proving contract damages in a

computer programming case. The misconduct later alleged against Judge Baker was regarding this disclosure first made in the draft delivered on May 14, especially the emphasized words:

> An alternative approach to proving damages would be by proving the cost of taking the original UBS software as purchased by Disney VC and bringing it up to the equivalent of the "improved version."
>
> In anticipation of this lawsuit and this issue of damages, I made some inquiries of computer consultants as to how they might approach the question of damages. Their first choice was market value, but failing that, they suggested cost of development of the "improved version." As an illustration, it was suggested that we must know the cost of developing the original software purchased by Disney VC, which we obviously do, [sic] Then, if the original software included 10,000 lines of code and 3000 functions, it would give a rough guide as to the cost of development per line and per function. Then, if it is established the "improved version" has 15,000 lines and 350 functions, we could project the cost of developing the improvements. This is not a simple calculation by any means. The additional lines and additional functions might be more expensive to develop (or less expensive), but there does not seem to be any impediment to obtaining expert evidence on the cost of developing a program from such an approach.[1]

(JQC Exh. 2, p.3).

At the time he delivered the draft to each counsel on May 14 in open court, Judge Baker explained himself thus:

> I thought it was fair to the parties to draw up my notes on this subject and give them to you....

[1] All emphasis has been added, unless we otherwise note it.

***

> I'm not sure I'm doing anybody any benefit to give you this [referring to the draft], but on the other hand, that's what I did it for, was to put together my best thoughts, mainly anticipating that we're going to get to a charge conference that's just going to be irresolvable, and we're going to get to evidentiary questions that are going to get to be irresolvable. I thought in all fairness I would tell you at least what I was thinking about; so you'll read this.

***

> Mr. Solomon [Plaintiff's attorney], one of the reasons I wanted to write this [draft] and give it to you was that as a judge I get paid a check at the end of the month, and I get free overhead, and every time lawyers come in here, especially on a case like this, I have great sympathy for the expenses that you incur, and I don't want to deal with this issue lightly or frivolously, and I want everybody to see the problems that I see before they become irremediable, and that's why I did this. At least I'm trying to act in as good faith as I can to tell you what the problems are as I see them.

(T 921-922).

This dialogue with counsel and the eight-page draft make clear Judge Baker disagreed with the legal theory of contract damages being put forward by plaintiff. Judge Baker's several and lengthy discussions with counsel in open court about his disagreement with plaintiff's theory of proving damages began at the outset of the trial, as can be seen at T 275-284. Besides the written draft, the record reflects discussions with counsel running two hours on T 381-458, followed by discussions at T 458/19-459/9, 565/19-567/5, 1357/16-24, 1045/17-1053/1, 1102/4-1123/21.

In all of the discussions and in the entire transcript of the trial, not one word can be found from counsel disputing, objecting or even discussing the draft delivered on May 14, 1999. There is simply no mention of the draft delivered on May 14 by either counsel. Neither is there any motion or pleading or letter in the record or off the record of the trial proceeding in which that draft delivered on May 14, 1999, is mentioned.

Memorandum of Ruling and Second Disclosure

After the jury returned a verdict of $2,000,000 for UBS, Judge Baker was still of the opinion he had stated in the draft he delivered on May 14 and in his discussions with counsel that plaintiff's proof of damages was legally insufficient. Judge Baker concluded plaintiff was entitled to nominal damages, since plaintiff had proven a breach of contract. Before entering judgment setting aside the jury verdict, Judge Baker wrote a Memorandum of Ruling dated July 15, 1999. This Memorandum of Ruling was not an order or a final judgment, but a statement of Judge Baker's legal opinion on the issue of damages prior to entering judgment that would allow comment or correction from counsel. None was given. The Memorandum anticipated a final judgment would be entered later.

This Memorandum of Ruling developed out of the earlier draft delivered to counsel in court on May 14, 1999. The Memorandum incorporates much of the language of the earlier draft with some revisions, including this language on page 8:

> The testimony in this case is that there is a market for software of the sort involved in this case. There is no obvious reason why

expert opinion testimony could not be obtained as to the market value of this "modified version" of the software. However, it was not adduced or offered.

Although I do not accept plaintiff's argument that damages can be measured by the cost of creating the "modified version" of the software, even if one does accept it, the burden of proof was not met. The evidence in this case as well as common sense and common experience tell us it would not be difficult to obtain expert testimony on the nature and extent of the changes in the software made by Disney and the cost of duplicating those changes. Computers and software are so commonplace, there is no difficulty in finding experts on them around the courthouse as elsewhere. I made a few inquiries of computer consultants and experts, describing the general nature of this task and asking if there were a practical way to approximate the cost to the retailer to take the original UBS software and bring it up to the "modified version" in use at Disney. The suggested approach was quite simple and consistent with the evidence.

They suggested that UBS must know the cost of developing its own original software purchased by Disney. Plaintiff also had access to the "modified version" in the tapes received as well as access by discovery to the full system in use at Disney. It would be rather easy to compare the original software with the "modified version." If the original software included 10,000 lines of code and 300 functions, for example, it would give a rough guide as to the cost of development per line and per function. Then, if it is established the "modified version" has 15,000 lines and 340 functions, we could project the cost to someone like UBS of developing the changes and modifications. This simple calculation, is not the whole store, by any means. The additional lines and additional functions might be more expensive to develop (or less expensive), but there does not seem to be any

> theoretical or practical impediment to obtaining expert evidence on the cost of developing a program to UBS or a similar software retailer using such an approach. This is very much akin to the method appraisers use to give opinion testimony on the cost of constructing a building.

(JQC Exh. 1, pp. 8-9).

Since this Memorandum of Ruling was not a final judgment, either counsel in the case could have addressed any problems they saw with this Memorandum of Ruling (as well as the earlier draft delivered on May 14) by motion or at a hearing or simply by a letter to the judge. Nothing was said or written regarding either the draft delivered May 14 or the Memorandum.

Appeal

Nothing about Judge Baker's draft delivered on May 14 or his Memorandum of Ruling was ever questioned by counsel until appellant's brief on appeal of *UBS v. Disney VC* to the Fifth DCA. It was not a point on appeal, but Plaintiff argued that the language in the Memorandum of Ruling quoted above showed Judge Baker had violated Canon 3B(7) of the Code of Judicial Conduct. Disney's brief did not respond to this argument, and, according to counsel for Disney, it was not mentioned in oral argument before the Fifth DCA.

Neither was it mentioned by Appellant UBS to the district court of appeal that Judge Baker had disclosed his conversations with consultants and experts in the draft delivered in court on

May 14, 1999. That draft used almost identical language to the Memorandum and recited the very same example of a method of comparing lines of computer code and functions.

The Fifth DCA reversed Judge Baker's decision in overruling the jury verdict. The first time Judge Baker had any inkling he had been accused of judicial misconduct was in the language of the district court opinion in *UBS v. Disney VC*, 768 So. 2d 7 (Fla. 5th DCA 2000). The district court opinion contained this language:

> UBS also asserts that the trial court's ruling is flawed by its admitted participation in improper ex-parte communications regarding the issue of damages. This assertion is based on the trial court's statement contained in its Memorandum explaining its ruling:
>
> I made a few inquiries of computer consultants and experts, describing the general nature of this task and asking if there were a practical way to approximate the cost to a retailer to take the original UBS software and bring it up to the "modified version" in use at Disney.
>
> We do not make a comment as to whether the trial court violated Canon B. However, it is clear from the trial court's own statement and the record before us that the trial court improperly considered information gleaned from ex-parte communications in reaching its decision to override the jury's verdict.

Disney, 768 So. 2d at 8.

The draft delivered to counsel on May 14 was evidently not included in the court file, and therefore would not have been in the record on appeal. The only reference to the draft delivered on May 14 in the trial transcript was by Judge Baker on that date, and as best we can determine it was not mentioned in the briefs or

arguments of counsel on appeal. We can only assume the district court was unaware counsel had been given the May 14 draft during trial that contained the same disclosure as to computer consultants and experts as the Memorandum of Ruling. It was never mentioned to the district court that Judge Baker had solicited comment from counsel during trial as to the method of comparing computer code.

Nature of the Case — *UBS v. Disney VC*

The parties had previously settled a copyright lawsuit over software sold by UBS to Disney. The trial before Judge Baker was of a lawsuit arising out of the settlement agreement to the earlier copyright lawsuit. Plaintiff UBS claimed Disney had breached its contract promise to deliver an in use copy of the software.

Judge Baker saw these as very technical and complex issues (T 283/23-284/1, 518/2-3). As his comments during trial, his draft and his Memorandum of Ruling reflect, he believed understanding the technical computer programming matters on which evidence was being presented was essential to and part of any research he must do in order to make legal decisions in this case.

Judge Baker had held 20 to 25 pretrial hearings on *UBS v. Disney VC* (T 17/13-16), during which he had formed impressions of the case, done research, heard argument and made rulings. There were no close legal precedents involving the technical issues of computer programming involved in *UBS v. Disney VC.* The breaches alleged by plaintiff are described from the beginning and throughout the trial by counsel and witnesses in technical computer programming terminology. The highly technical nature of the case

is summarized by plaintiff's expert witness, Albert Barsa (T 672-742), who described himself as a "geek."

The trial transcript reflects that Judge Baker repeatedly stated he was very troubled by the application of traditional contract damages theories to this case. Neither he nor counsel could find any close legal precedent (T 918/13-21).

Investigation and Formal Charges by the JQC

A Notice of Investigation was issued to Judge Baker by the JQC alleging:

> 1. During the pendency before you of the case of Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., without disclosure to counsel or the litigants, you made inquiries of several computer consultants and experts concerning technical issues relating to the issue of damages in the case, and thereafter ruled in accordance with that advice.
>
> 2. The initiation of these inquiries and receipt of their advice constituted an improper ex parte communication by you.

Judge Baker appeared before the Investigative Panel on November 10, 2000. Thereafter, they issued a Notice of Formal Charges on December 5, 2000, that reads as follows:

> 1. During the pendency before you of the case of Universal Business Systems, Inc., v. Disney Vacation Club Management Corp., 2000 WL 905248 (DCA Fla. 5th 2000), without disclosure to counsel or the litigants, you made inquiries of several computer consultants and experts concerning technical issues relating to the issue of damages in the case. Subsequently, you reduced a jury award of damages in favor of Universal Business

Systems, Inc. to a nominal amount. In your memorandum explaining your decision, you disclosed for the first time that you had made these inquiries [emphasis added], stating only that your decision to reduce the damage award was consistent with the input you received from the unnamed consultants and expert. On appeal, the Fifth District Court of Appeal reversed the ruling on several grounds, including its finding that you improperly considered information gleaned from ex-parte communications in reaching your decision to override the jury's verdict.

2. The initiation of these inquiries and receipt of the advice of the consultants and experts constituted initiation and receipt of improper ex-parte communications on your part. (Emphasis added)

The acts described above, if they occurred as alleged, were in violation of Canons 1, 2 and 3, of the Code of Judicial Conduct. Further, these acts, if they occurred as alleged, would impair the confidence of the citizens of this state in the integrity of the judicial system and you as a judge, (emphasis added) would constitute conduct unbecoming a member of the judiciary, could demonstrate your present unfitness to hold the office of judge and could warrant discipline, including removal from office, and discipline as an attorney.

Hearing Panel

Testimony and other evidence was presented before the Hearing Panel in the Orange County Courthouse on April 23, 2001. The JQC called only one witness, Judge Baker. Three witnesses were called by Judge Baker. Chief Judge elect and former Chief Judge Belvin

Perry, Judge J. Charles Scott, retired circuit judge from Illinois, and Professor Amy Mashburn, professor of law and ethics at the Fredric G. Levin College of Law at the University of Florida. (T 157, 167, 225)

Seven and a half weeks later on June 12, 2001, the Hearing Panel filed its Findings, Conclusions and Recommendations. They state these conclusions about Judge Baker's conduct in the jury trial of *UBS v. Disney VC*: "his motives were not the result of favoritism for either party" (p. 11); "the Panel finds no violation of any other canon and finds no corrupt or bad motives" (pp. 12-13); "We accept Judge Baker's assertions that he was only seeking the truth" (p. 13); there was an "absence of corrupt intent" (p. 13); Judge Baker had a "sincere concern for his own view of justice" (p. 13), and,

> Judge Baker is guilty of absolutely no bad motives. Although the post-trial ruling favored the Disney defendant, there is no contention whatsoever that Judge Baker was not being completely fair to both sides (footnote #6, p. 20).

Then, in conclusion, the Hearing Panel recommended that "Judge Baker be found guilty and admonished for his conduct in a written admonition."

SUMMARY OF ARGUMENTS

Issue I — The Hearing Panel found no bad motives, no corrupt intent, no favoritism, and found Judge Baker was completely fair to

both sides. The only basis for sanctions is the district court decision he had erred, which is not grounds for discipline.

Issue II — A) The undisputed evidence contradicts the allegation that Judge Baker's research and inquiries were disclosed for the first time in his Memorandum of Ruling, for they were admittedly disclosed in a draft Judge Baker delivered to counsel on May 14, 1999, during trial. B) There is no evidence that Judge Baker's conduct impairs the confidence of the public in the judiciary or Judge Baker himself, as alleged. C) By dictionary definitions, court practice and legal precedents, Judge Baker did not participate in "ex parte" communications, as alleged.

Issue III — Canon 3B(7) proscribes communications to a judge that are ex parte (from attorneys, parties or witnesses) and "other communications" from interlopers who are trying to influence the judge's decision. Judge Baker had none of these.

Issue IV — Federal Rule of Evidence 201 represents the modern trend encouraging judges to independently inform themselves. FRE 201 is a suitable guide for judges in Florida jury trials, since juries are the fact finders and judges need to know legislative facts, which are those necessary to make legal decisions. Under FRE 201 a judge has the duty to disclose research to counsel and give them an opportunity to be heard. Judge Baker did so during trial orally and in writing.

Issue V — The JQC interpreting the "other communications" phrase of Canon 3B(7) to include <u>all</u> communications creates a violation by a judge discussing any aspect of a pending or impending case with a spouse, other relative or friend. Violations

would occur when judges hear communications relevant to pending or impending cases at Continuing Judicial Education classes, other educational classes, from witnesses or attorneys in one case with issues similar to another, from news media coverage, educational TV. This makes the Canon unworkable.

Issue VI — Although this court has found the constitution, procedures and practices of the Florida JQC do not violate the Due Process provisions of the Fourteenth Amendment to the United States Constitution, this should be revisited.

ARGUMENT

ISSUE I

THE FORMAL CHARGES AGAINST JUDGE BAKER ARE FOR JUDICIAL ERROR AND NOT MISCONDUCT

This Court has the unusual role of both declaring judicial error when it sits in its reviewing function, and in adjudicating misconduct when it sits in that capacity. It is the function of appellate courts to declare judicial error as they see it. Judicial error is not misconduct, for obvious reasons. If it were otherwise, then every time a judge were reversed, it would be grounds for a disciplinary proceeding.

Numerous appellate courts throughout the United States have addressed the issue of whether and under what circumstances judicial error is the basis for judicial disciplinary proceedings. These courts, like Florida, uniformly hold judicial error is not a basis for judicial discipline with narrow exceptions, noted below, that do not apply in this instance.

It is hardly surprising that the courts have uniformly reached such a conclusion, for honest, good faith mistakes about what the law is (or will become) are not the stuff of which ethical and professional transgressions are made. The "exercise of poor judgment" or "judicial error" does not warrant discipline; something more than mistake is required to invoke and justify the powers of judicial disciplinary proceedings. *See, e.g., In re Conard*, 944 S.W.2d 191 (Mo. 1997); *In re Worthen*, 926 P.2d 853 (Utah 1996); *In re Bell*, 894 S.W.2d 119 (Tex. Spec. Ct. Rev. 1995); *In re Conduct of Schenck*, 870 P.2d 185, 318 Or. 402 (Or. 1994); *Matter of Seaman*, 627 A.2d 106, 133 N.J. 67 (N.J. 1993); *In re Elliston*, 789 S.W.2d 469 (Mo. 1990); *In re Voorhees*, 739 S.W.2d 178 (Mo. 1987); *Complaint of Judicial Misconduct*, 8 Cl.Ct. 523 (Ct. 1985); *Matter of Benoit*, 487 A.2d 1158 (Me. 1985). Similarly, numerous courts have held that judicial error should be addressed on appeal, not by disciplinary proceedings. *See West Virginia Judicial Inquiry Commission v. Dostert*, 271 S.E.2d 427 (W.Va. 1980); *Nicholson v. Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky. 1978); *People ex rel. Harrod v. Illinois Courts Commission*, 372 N.E.2d 53 (Ill. 1977); *Matter of Richter*, 409 N.Y.S.2d 1013 (N.Y.Ct.Jud. 1977); *In re Nowell*, 237 S.E.2d 246, 293 N.C. 235 (N.C.1977); *In re Stuhl*, 233 S.E.2d 562 (N.C. 1977); *Matter of Edens*, 226 S.E.2d 5 (N.C. 1976).

Numerous reviewing courts have recognized that allowing disciplinary proceedings to act as additional or alternate appellate courts would be inconsistent with what disciplinary

proceedings should be. *See, e.g., In re Troy*, 306 N.E.2d 203 (Mass. 1973) (the "Supreme Judicial Court cannot permit or encourage use of disciplinary power of the court as initial remedy for alleged error in judgment or abuse of discretion by a judge. Attempts to correct judicial action in these areas must be left to established methods of appeal"); *See also, Murtagh v. Maglio*, 195 N.Y.S.2d 900, 9 A.D.2d 515 (N.Y. 1960); *Perez v. Meraux*, 9 So.2d 662 (La. 1942); *In re Capshaw*, 17 N.Y.S.2d 172, 258 A.D. 470 (N.Y. 1940); and *Staples v. Sprague*, 31 Ohio Law Rep. 120 (Ohio App. 1929).

Other courts have followed this doctrine. For example, in *Matter of King*, 568 N.E.2d 588 (Mass. 1991), as in *Perry*, the court held that error could rise to the level of judicial misconduct only because the judge utterly disregarded law and procedure and established personal rules of court in face of contrary orders. Similarly, in *In re Kelly*, 407 N.W.2d 182 (Neb. 1987), the court held that disciplinary misconduct requires a finding that the "misconduct is 'willful,' [shows] bad faith," and that the "willfulness involves more than error of judgment." *In re Kelly* went on to say that "a certain amount of honest error is expected of judges and does not necessarily warrant discipline." Error could rise to the level of misconduct for discipline only where it is "blatant, fragrant [or involves] repeated errors or failures in performance of judicial duties." *Id.*

This Court has recognized what every court in the nation has

held: judicial error is not the basis for judicial disciplinary proceedings. Something more is required for discipline than a finding that a judge has erred. That was announced in *Inquiry concerning Perry*, 641 So. 2d. 366 (Fla. 1994). There, this Supreme Court reprimanded Judge Dan Perry for these offenses: abusing the contempt powers of a judge by setting up traps for defendants in traffic cases to catch them violating driving restrictions after they left his court in a plan coordinated with police; not following prescribed procedure for indirect contempt; imposing excessive bail resulting in lengthy incarcerations prior to hearings with the evident purpose of coercing pleas; and imposing jail time in relatively minor traffic cases. This Court held this was not merely judicial error but was a purposeful and planned misuse and abuse of contempt powers.

Here, the Findings, Conclusions and Recommendations of the JQC states the following things about Judge Baker's conduct in the jury trial of *UBS v. Disney VC*: "his motives were not the result of favoritism for either party" (p. 11); "the Panel finds no violation of any other canon and finds no corrupt or bad motives" (pp. 12-13); "We accept Judge Baker's assertions that he was only seeking the truth" (p. 13); there was an "absence of corrupt intent" (p. 13); Judge Baker had a "sincere concern for his own view of justice" (p. 13), and, finally, and most strikingly:

> Judge Baker is guilty of absolutely no bad motives. Although the post-trial ruling favored the Disney defendant, there is no contention whatsoever that Judge Baker was not being completely fair to both sides.

(JQC Recommendations at 20 n. 6).

What is left of Formal Charges against Judge Baker, quoted above, is simply this: Judge Baker made a decision to overturn a jury verdict, and he was reversed by the district court of appeal. In contrast to Judge Perry, the JQC gave encomiums to Judge Baker. Absent bad motive, evil intent, or unfairness, the only thing left to sanction is bad consequences. Assuming the district court of appeal was correct that Judge Baker erred in setting aside the jury verdict, they have corrected what they saw as an incorrect outcome. Nothing is left as the basis for sanction except the bare finding of an appellate court that Judge Baker had erred. Error, however, is not discipline, nor should it be, and therefore in this case it should not form the basis of a ruling by this Court that Judge Baker should be sanctioned.

ISSUE II, A

THE EVIDENCE DOES NOT SUPPORT THE FORMAL CHARGES THAT JUDGE BAKER'S INQUIRIES WERE DISCLOSED FOR THE FIRST TIME IN HIS MEMORANDUM OF RULING

The Notice of Formal Charges alleges that Judge Baker's Memorandum was the first notice to the parties that he "had made these inquiries." This allegation is false, and the JQC's Recommendations demonstrate the falsity and establish that Judge Baker disclosed his actions during trial on May 14, 1999. The JQC's Recommendations state:

> While UBS was presenting its evidence in the first four days of trial, Judge Baker prepared an eight-page analysis on his bench computer. He gave this document to the attorneys. (JQC Exh. 2, "History of the Case"). This analysis made vague references to conversations with

> computer experts. (JQC Exh. 2, p.3). Thus, the first notice to counsel of the conversations was after the fact and gave no details on who had been contacted.

Later, the JQC again acknowledges the May 14 disclosure:

> Judge Baker's first written advice to counsel of his outside contact occurred on Friday, May 14th, at the end of that trial day. (JQC Exh. 3, Trial Tr. p. 890-922). At that point, Judge Baker handed counsel his eight-page, single-spaced "History of the Case" which he had typed and printed on his bench computer based on his "research" during the trial. This document stated that on the "issue of damages I made some inquiries of computer consultants...."

(JQC Recommendations at 16.)

After all the argument by the JQC, the bottom line in the Recommendations is the Hearing Panel admitted that the charge Judge Baker "first disclosed" his inquiries in the Memorandum of Ruling after trial is simply not true, as illustrated by the Recommendations themselves.

Therefore, it is clear that the parties and counsel received notice during the trial of Judge Baker's actions (not to mention months of notice that he considered the damages theory flawed), not after the trial, and it is also clear that plaintiff's counsel had a three-day weekend to review, digest and respond to the draft received on May 14 during the trial. After that, counsel had two months between the first disclosure on May 14 and the second disclosure in the Memorandum of July 15. After that, counsel had over a month before the final judgment was entered during which plaintiff could simply put forward to Judge Baker some contrary

information if they honestly believed that could show Judge Baker that he was wrong. In his draft delivered during trial and in his Memorandum after trial Judge Baker openly acknowledged this possible means of comparison of lines and functions was not "simple by any means," and he invited comment on the method. Even after a final judgment was finally entered, if plaintiff's counsel had any corrections for Judge Baker, it could have moved for a rehearing.

The significance of this distinction is perhaps best illustrated by the JQC itself, for its Recommendations state repeatedly that Judge Baker did not disclose his activities until after trial, thereby depriving plaintiff of an opportunity to shape trial testimony. The fact that the Recommendations themselves establish that the disclosure occurred during trial simply underscores how thin this case is, and how illusory is the notion that the subject actions are sanctionable.

ISSUE II, B

THE EVIDENCE DOES NOT SUPPORT THE FORMAL CHARGES THAT JUDGE BAKER'S CONDUCT WOULD IMPAIR THE CONFIDENCE OF THE CITIZENS OF THIS STATE IN THE INTEGRITY OF THE JUDICIAL SYSTEM

The rules of discipline require that the sanctionable conduct at issue be found to "impair the confidence of the citizens of this state in the integrity of the judicial system" and in Judge Baker himself. In a typical disciplinary proceeding, such a finding would be implicit in the sanctionable behavior. When a judge abuses power, steals, cheats, lies, or even communicates with one side or the other (or someone allied similarly, with an "ax to bear"), it is fundamental that the citizenry can and will lose

confidence in both the judge and in the system in which that judge serves.

We do not believe that this essential component of a disciplinary proceeding was met in this case, nor could it be. Certainly, there was no evidence at trial to support this notion; indeed, the only evidence presented on public attitude toward judicial researching was the supplemental authority from us with a newspaper article showing Justice Blackmun was deemed praiseworthy for similar research at the Mayo Clinic educating himself about abortion in preparation for his writing the court's opinion in *Roe v. Wade*.

The responses Judge Baker has received, along with us as his counsel, are not evidence. However, there is nothing at all evident about the charge that Judge Baker's conduct would impair confidence by the public in the integrity of the legal system.[2] We respectfully suggest that just the opposite is true: the public appears to believe, understandably, that a judge who cares enough about his work to take extra time and effort to get it right should be championed, not criticized.

It has obviously irked some on both panels of the JQC that Judge Baker will not admit misconduct and disavow his sincere beliefs and honest interpretation of Canon 3B(7). Indeed, Judge Baker even now finds himself in the awkward position of continuing

[2] It would be ironic indeed if this Court were to engage in independent social science research to test whether, in fact, Judge Baker's actions would cause Floridians to lose confidence in the judiciary, for, of course, this Court would be engaging in the very behavior this proceeding has sought to proscribe!

to fight this proceeding, while simultaneously recognizing that the JQC went to great lengths to recognize his sincerity and good motivations, and even suggested a lesser sanction than the rules appear to establish as a minimum.

Judge Baker believes, however, that it would be improper for him to say that he had been misguided all along, when he believed what he did was right — even though he and his counsel *repeatedly* advised the JQC that Judge Baker would follow whatever dictates the JQC chose to establish on such research in the remaining few months he has on the bench. The JQC repeatedly refused this offer, and instead demanded a trial. Judge Baker believes it would be a disservice to the judiciary for him to make such a decision, himself, and voluntarily accept sanctions. He believes that decision should be left to higher authority than himself on interpreting the Code of Judicial Conduct.

ISSUE II, C

THE EVIDENCE DOES NOT SUPPORT THE FORMAL CHARGES THAT JUDGE BAKER'S HAD EX PARTE COMMUNICATIONS

A third point on which the evidence admittedly does not support the JQC's Formal Charges is the allegation of "receipt of improper ex-parte communications." The JQC Findings admit (p. 13) that *Black's Law Dictionary* and every other reputable dictionary, such as the *Oxford English Dictionary, Merriam Webster* and the like define "ex parte" to mean "by or on behalf of one party, only."

We have researched the subject of discipline of judges for ex parte communications, as have our witnesses and other legal scholars as well as counsel for the JQC. <u>All</u> of the cases where

judges have been disciplined for ex parte communications in American jurisprudence have been for ex parte contacts with attorneys, parties or witnesses. In its Recommendations the JQC cites its authorities against Judge Baker. Every one of these disciplinary cases against a judge from Florida and elsewhere was for ex parte communications between the judge and attorneys, parties or witnesses. The case singled out as primary authority in the Findings is *In re Conduct of Schenck*, 870 P. 2d 185 (Or. 1993), and this was a case that involved ex parte communications between the judge and a district attorney regarding pending cases. (There were other charges against the judge as well in *Schenck*.)

The Findings do not contend Judge Baker received communications from attorneys, parties or witnesses. Thus, the JQC's Recommendations make new law on what is an ex parte communication. This is not the case for expansion of that law, and without that expansion, Judge Baker is the first judge in American history to face sanctions for research, educating and informing himself!

ISSUE III

CANON 3B(7) DOES NOT PROHIBIT THE CONDUCT OF JUDGE BAKER

More needs to be said about interpretation of Canon 3B(7), but we must first dispel what the JQC's Recommendations said about "No harm no foul." It is simply not true that either Judge Baker, his witnesses or his counsel have relied on a "No harm, no foul" principle of ethics, nor would we. The "no harm no foul" idea was

mentioned only by the presiding judge, and appears to be a misunderstanding of the expert testimony on the Judicial Canons.

Judge Baker testified and wrote in responses to the charges that he had done some research bearing on Canon 3B(7), and he read the sentence containing the "ex parte communications or other communications" to refer to communications that were made to the judge trying to influence the judges decision. As Judge Baker interpreted that sentence, "ex parte" communications are attempts by attorneys, parties or witnesses on one side to influence the judge. "Other communications" should be read as part of the whole sentence, and it is an extension of the phrase "ex parte" which it follows. "Other communications" extends the ex parte proscription to outsiders, strangers (not attorneys, parties or witnesses) who seek to interlope into litigation and influence the judge. Would-be interlopers are a not uncommon problem familiar to every trial judge.

All of the cases involving discipline of judges under Canon 3B(7) for ex parte communications were for those with attorneys, parties or witnesses. The cases interpreting the "other communications" phrase are few, but they refer to interlopers, i.e., someone who seeks to influence the judge on behalf of a party or a position in litigation. An example of this is *In re Marriage of Wheatley*, 697 N.E.2d 938 (Ill. App. 5th District 1998), in which the appellate court held a letter to the judge from a former Congressman recommending a certain outcome in a custody case required vacating the custody order. This case is consistent with

Judge Baker's interpretation of the "other communications" phrase of Canon 3B(7).

As observed before, for trial judges, interlopers are a not uncommon problem. Persons who support a cause, such as those who are for or against the death penalty, write letters to a judge regarding a case. Persons who are not parties but feel they may be affected by a judge's ruling on an issue such as a zoning case write letters to a judge. Neighbors or acquaintances of parties write a judge, often in divorce cases such as *Wheatley*, cited above, on questions of child custody. Because this is a real problem, Judge Baker considered those to be the kind of "other communications" to which Canon 3B(7) was directed.

As to research and inquiries, Judge Baker followed Federal Rule of Evidence 201 as a guide. As the Advisory Committee Notes to FRE 201 explain, this rule authorizes a judge who is not the trier of fact, such as when presiding in a jury trial, to do independent research regarding "legislative facts." Legislative facts are distinguished from adjudicative facts. Judge Baker is quite familiar with the distinction between the jury which decides the facts and the judge who only rules on law. In hundreds of jury trials he has read for himself and to the jury Preliminary Instruction 1.1 with this language:

> By your verdict, you will decide the disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdict. In other words, it is your responsibility to determine the facts and to

> apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Standard Jury Instruction, Preliminary Instruction 1.1.

In Florida civil trials the jury's role is determining the adjudicative facts. The judge's role is deciding the law. To make legal decisions the judge must use law-making, or legislative, nonadjudicative facts. This distinction dovetails with FRE 201. In the Advisory Committee Notes to FRE 201 (p. 3) it is observed of a judge in a jury trial that:

> [D]eciding whether evidence should be admitted [and] assessing the sufficiency and effect of evidence all are essentially nonadjudicative in nature.

Judge Baker did not attempt to adjudicate facts. He assessed the sufficiency and effect of evidence, as he is required to do when the issue is raised during and after trial. Legislative facts are those facts the judge needs to know and understand in making legal decisions. Judge Baker read Federal Rule of Evidence 201 [and Professor Amy Mashburn (HT 236-242, exp. 241) agreed with his interpretation] as recognizing the obvious fact of judicial life that making legal rulings required more than reading law books. Judges need to understand what a case is about and what the witnesses are talking about to evaluate legal argument and decide legal issues. A case where this is a challenge is one like *UBS v. Disney VC* where the parties and witnesses are all computer programming experts using technical jargon.

Federal Rule of Evidence 201(e) preserves the adversarial system and due process to parties. That subsection requires of judges who do independent research that they give counsel notice of what the judge has discovered and an opportunity to be heard. Judge Baker was scrupulous about doing so on May 14, 1999, during trial of *UBS v. Disney VC*, and later in his Memorandum of Ruling on July 15.

Professor Mashburn concurred with Judge Baker that his interpretation of Canon 3B(7) was the most reasonable one (HT 236/3-14), and the inquiries and responses of Judge Baker were not violations of the Canon because they were to and from persons who were not attempting to influence the judge for one party. She testified Judge Baker had confirmation of his interpretation of the rule by being praised in a supreme court opinion and based on his extensive experience as a trial judge. *Dep't. of Agriculture v. Polk*, 568 So. 2d 35(Fla. 1990). Professor Mashburn also testified that an all-inclusive interpretation of "other communications" doesn't give any guidance at all on the legal question of limits to judicial research. (HT 236/15-237/7).

Finally, in his interpretation of Canon 3B(7), Judge Baker and his witnesses relied on the language of the Code of Judicial Conduct, itself. The Preamble to the Code includes this:

> The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. <u>The Code is not to be construed to impinge on the essential independence of judges in making judicial decisions</u>.

***

Preamble, Code of Judicial Conduct. In contrast to the principles and legal precedents used by Judge Baker and his witnesses for interpreting Canon 3B(7), during the proceeding before the Hearing Panel the presiding judge questioned Professor Mashburn's testimony and that of Judge Baker and Judge Scott as to whether it was simply "No harm no foul" ethics. The presiding judge, at page 263 of the transcript, specifically asked Professor Amy Mashburn, if she was contending, "[When] lawyer's don't complain, No harm no foul, no violation?" To which she replied:

> No. In fact, it's the exact opposite because — this is something I have to really hammer to my students where lawyers are concerned. That may be you don't have a malpractice case if you have no damage, but it doesn't mean that you haven't violated the ethical rules.
>
> What I'm saying is something a little bit different. I'm saying that because the judge's communications also involved communicating to the lawyers involved — and I understand the point that they didn't really have an opportunity, but I believe there was an opportunity there to follow up on this — that it means it's not an ex parte communication or an otherwise prohibited communication; not that the lawyers' behavior, by waiving this, somehow creates an estoppel or says that the — that he has not created an infraction.

HT at 263.

It is disheartening that the JQC appears to have adopted the notion that Judge Baker's defense to this action was to say that anything goes as long as the lawyers don't complain. That is not

the case at all. To the contrary, what Professor Mashburn testified about, and what Judge Baker has underscored, is simply that because the parties had notice, then his communications with out-of-court experts were not prohibited by the canons.

ISSUE IV

FEDERAL RULE OF EVIDENCE 201 IS A PROPER GUIDE FOR FLORIDA JUDGES TO FOLLOW

Judge J. Charles Scott testified as an expert that Judge Baker had not committed any ethical violation and relied in part on Federal Rule of Evidence 201 as did Professor Amy Mashburn. The fact that the Federal Rules so clearly discuss and delineate the issues inherent in this proceeding, coupled with the fact that Florida has no contradictory law "glossing" the actual language of the canons speaks again to the reasonableness of Judge Baker's interpretations of the judicial canons. Judges on the west side of Interstate Highway #4 in the Federal Courthouse are authorized to research, inquire and inform themselves about cases. The Florida JQC is seeking to condemn Judge Baker for this same conduct since he is a mere state judge sitting on the east side of I-4 in a county courthouse.

Professor Mashburn (HT p. 246) was asked about the influence of FRE 201:

> MS. DOWNS: Now, of course, Federal Rule 201...doesn't apply in this courtroom here in a state court proceeding.
>
> PROF. MASHBURN: No.
>
> MS. DOWNS: Does that change your opinion in any way?

> PROF. MASHBURN: No. Because, if anything, if I were a judge and I were trying to think through this question, would this be permissible or not, one thing I might look at would be the trend of what's going on on the Federal side, which, believe me, is clearly in the direction — with cases like Daubert and with another Federal rule as well as 201 of saying that judge are the gatekeepers to keep junk science of the courtroom.
>
> So whether the state agrees — and it would be anomalous, indeed, to say that our Federal system has adopted a standard that we're going to declare that a state judge should be removed or reprimanded for doing — it seems to me to be anomalous.
>
> Because on the Federal side the judges are being given more and more leeway under their inherent power to do precisely what the judge did here: give notice, acquire technical information that would be necessary — you know, not in this case, but necessary for him to evaluate experts, because he's going to rule, in a lot of cases, on whether that testimony should even come in or not. How could you do that with no background?
>
> And so I think on the Federal side — although the rule doesn't apply — but I think if I were a judge, I would look at that and I would see that this is the trend that the courts are moving in.

HT at 263.

The Findings, Conclusions and Recommendations dealt with Federal Rule of Evidence 201 (at p. 5) in one sentence, noting that Judge Baker's witnesses "relied" on the federal rule, but that both experts "agreed the federal rule was not applicable" here. This analysis misses the point entirely that even if this Court makes new and different law for Florida to follow on these points, *for*

the purpose of a discipline proceeding, how can we say Judge Baker should be punished because he turned out to be wrong about what the law in Florida might be in the future? And, his actions were proper under the federal rule, which has not been contradicted by any Florida court.

ISSUE V

THE JQC INTERPRETATION OF CANON 3B(7) IS UNWORKABLE AND WOULD RESULT IN REGULAR, UNAVOIDABLE VIOLATIONS AND REQUIRE SELF-IMPOSED IGNORANCE

Professor Amy Mashburn was doubtless the most knowledgeable person on legal and judicial ethics to testify in this proceeding. She testified how the strict and literal interpretation of Canon 3B(7) by the JQC makes the Canon unworkable. She showed how the JQC interpretation is unreasonable, impractical, it would lead to unavoidable, repeated unintentional violations and self-imposed judicial ignorance:

> MS. DOWNS: And how long have we been dealing with Canon 3B(7)?
>
> PROF. MASHBURN: 1990.
>
> DOWNS: Okay.
>
> MASHBURN: In its present form.
>
> DOWNS: So this language is new?
>
> MASHBURN: Um-hum.
>
> DOWNS: And you are saying that scholars are talking about what these phrases mean?
>
> MASHBURN: Exactly. In fact, there have already been calls and some states have

already modified their provisions of this rule to make the kind of issues we're talking about clearer.

DOWNS: Okay. Now let me go right to, I think — just to try to shorten this up — where you were going with this. Now, some might say, well, "other communications made to the judge outside of the parties concerning a pending matter," well, gee, that's pretty clear. That's just all communications made with any person about the matter.

MASHBURN: Right.

DOWNS: So why don't we just go with that definition?

MASHBURN: Because it would violate the rule-of-reason notion that's in the beginning of the Canon [quoted in the previous section of this brief]. Because if it's applied literally, it captures situations that one cannot imagine that the drafters intended to capture.

DOWNS: Like what?

MASHBURN: Well, things like — first, the word "communication" is an interesting word. What does it mean? If you sit and listen to something, is that a communication? Well, potentially it is.

So what about a judge who goes to a judicial college and attends seminars that are specifically directed to — how to gain technical expertise in certain type of cases like antitrust cases or more and more software type or copyright cases.

DOWNS: Well, what about an expert on child custody matters speaking to a judicial college about how you make child custody decisions? [This was one of the examples of paradoxes posed by Judge Baker to the Investigative Panel from his own experience at Continuing Judicial Education at judges' conferences.]

MASHBURN: Any form of CLE would come into question. What would also come into question is if you are — well, for example, a simple thing like talking to your spouse, acknowledging that you have a certain case. I mean, the rule, if literally applied — and I'm not the first or only person to say this — is unworkable.

So obviously we have to — as is the case with so many rules like this — interpret what — interpret the rule with reference to what was the problem that the rule was designed to address; what was the danger.

And the CLE thing is not the danger. The only thing would be what if you're in a fairly — a mid-sized community and you hear expert testimony in one case as a judge that is exactly the type of facts that we're — "facts," I want to put in quote — but where the expert is presenting information that would be directly relevant to your resolution of damages issues in another case.

Would you then have to recuse yourself because you had heard a communication that concerned a pending or impending matter? And I don't believe that was intended to be captured by the rule, either.

DOWNS: All right. But let's say — just to be safe, let's just take this meaning. What would be wrong — you say that couldn't be what the drafters meant and it's not workable.

Well, what would be wrong with applying this literally? What would be wrong as far as Judge Baker is concerned?

MASHBURN: Well, the — I mean — let me just start by saying that I agree with much of what Judge Scott said; that probably the best way to interpret this rule is that you bring the gloss of "ex parte communications" — which everyone I think generally understood as being communications from a lawyer, an occurrence witness, or a party — and you put that "by or

> on behalf of a party" gloss onto "other communications." So I want to say at the onset that I think that this communication doesn't violate the rule because it's not by or on behalf of a party.
>
> But even putting that aside — and let's say that we believe we ought to — if you believe that's a literal interpretation, take it literally — what then — well, for example, it doesn't deal with the legal question at all.
>
> It talks about consulting a legal expert, but what about a judge who educates himself on background matters by reading authoritative treatises such as consulting medical glossaries or charts that explain anatomy?
>
> You — you could not enforce the distinction. In other words, if you don't make the distinction, you could not fairly enforce this rule because it would chill judges in educating themselves in ways that do not go to the purpose or the evil behind the rule, which was an attempt to influence a judge on a factual matter outside the presence of the parties or their lawyers.

HT at 233-37.

This chilling of the judiciary by the JQC interpretation of Canon 3B(7) should be self-evident to any justice or judge. It is also not hard to see why Professor Mashburn was concerned about the JQC proceedings against Judge Baker. After all, this is the first prosecution of a judge for disciplinary sanctions for violation of Canon 3B(7) in ex parte or other communications other than with attorneys, parties or occurrence witnesses in the records of American jurisprudence, which would certainly appear to illustrate the point about selective enforcement.

As Professor Mashburn said of unworkability, what about a judge or justice who has two cases involving the same central technical issue? Under the JQC interpretation, a judge would be violating the Code of Judicial Conduct to listen to technical evidence in one of the cases without the presence of the attorneys in the other.

Then, a judge may have a technical issue in a pending or impending case that is also the subject of news reports or magazine articles or books the judge reads. For example, Judge Baker has at least two cases pending before him involving stents. While they were pending, Vice-president Cheney suffered a heart attack due to problems with a stent in one of his arteries. Television, news magazines, other magazines published medical opinions of cardiologists with drawings, charts, exhibits, pictures of heart procedures demonstrating the use and problems with stents. Is watching and reading these reports a violation of Canon 3B(7)? And do we really want judges who know nothing?

Judges hear testimony about the same or very similar scientific and technical subjects all the time. Judges can become experts in DNA evidence, drug testing techniques, breathalyzers, handwriting analysis. Currently, there is a large body of tire failure cases pending against Firestone and Ford in which the discovery has been consolidated before a Federal court in Indiana because the same expert witnesses will testify in every case. The only way to prevent a judge from violating the JQC's interpretation of Canon 3B(7) for the trial of these cases would be to allow no

judge to try more than one, or try them all together at one time before the same judge, as the discovery is being handled.

The JQC interpretation leads to endless situations that are unavoidable, as a practical matter, for judges and justices. For example, a judge calls home to tell his or her spouse of being late for dinner. To the spouse's likely question of "What's keeping you?" the only permissible answer is, "I cannot tell you." Next question, "Why not?" Answer: "It has to do with my judicial conduct." Although such examples are humorous, and may appear far-fetched, they illustrate how far such an interpretation could be made to stretch.

In answer to this problem of unworkability and enforced ignorance of the judiciary, the Findings, Conclusions and Recommendations says only this on pages 14-15:

> We reject the argument that "other communications" is too vague or too broad and would force the judge into being the least informed person in the courtroom. (T. 178) There may well be circumstances which present close questions as to <u>other</u> communications, but the present case is not one of them. A chance conversation about computers with a friend or spouse is not in question. Here Judge Baker sought out expert advice from more than one expert.

It must be remembered that the "expert advice" obtained by Judge Baker <u>was</u> from a close friend and a relative. (HT 51/16-21) The relative was not his spouse, but his daughter's spouse.

Despite what it says in the JQC Findings, conversations with close friends and relatives is precisely what occurred here.[3]

In sum, the JQC interpretation of the canons is both too restrictive, and unworkable and should be rejected.

ISSUE VI

THE JQC, ITS PROCEDURES AND PRACTICES VIOLATES FOURTEENTH AMENDMENT DUE PROCESS

We and Judge Baker are aware that this Court has upheld the Florida JQC and its procedures against challenges they violate the Due Process provisions of the Fourteenth Amendment to the United States Constitution. We are likewise aware of other jurisdictions that, like Florida, have said that in matters of judicial discipline, the highest court of the state is the sole adjudicative body. This and other courts have held the merger of prosecutor and investigator and hearing agency and finder of fact, as in the JQC, is cured of conflict with the Fourteenth Amendment by final adjudication in the supreme court. If this Court is inclined to adjudicate Judge Baker guilty in this proceeding, we believe the decisions of this court should be revisited on this issue. Without belaboring an issue already decided, we would submit some brief observations.

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[3] Judge Baker's son-in-law is a highly placed computer engineer with the United States Navy Labs, who previously spent 10 years on computer security for the Defense Department. The computer consultant friend also has an engineering degree and spent 25 years with IBM. Neither of these individuals has ever been unwilling to respond to questions about any aspect of computers. Judge Baker simply did not want to name them unnecessarily in a court document, as he testified before the Investigative Panel.

Nothing better discloses the due process deficiencies of the Florida Judicial Qualifications Commission in practice than the deliberate attempt to disguise them. First and foremost of these is the superficial attempt to make it appear there is a separation between the prosecutorial function and hearing function by the division of the Judicial Qualifications Commission into an "Investigative Panel" and a "Hearing Panel." This is a distinction and division on paper, only, because the Florida Constitution does not give the Judicial Qualifications Commission any judicial or quasi-judicial authority or jurisdiction. The only power granted to the JQC in the Florida Constitution is to "investigate and recommend." That being the only power, the only jurisdiction, the only mandate, the division into two panels is nothing more than the creation of two panels rather than one where each has authority only to "investigate and recommend."

Despite its mandate, the Hearing Panel seeks to appear judicial, not investigatory and prosecutorial. Its hearings are conducted with the trappings of judicial proceedings. One member of the Panel is on the bench while the other members of the Panel are arrayed in a jury box. Court deputies and clerks assume their roles. Witnesses are called, examined by counsel with the formalities of a jury trial. This gives the appearance of a judicial proceeding, but it is at cross purposes with a fair investigation. It limits the investigation as far as the judge is concerned, since the judge can only present the judge's case in this "hearing" subject to restrictions applied in judicial proceedings.

Since the Hearing Panel is reviewing the Formal Charges of its counterpart, the Investigative Panel, the Hearing Panel conducts its proceedings with a presumption of the judge's guilt. The judge gets the impression it makes no difference what evidence the judge presents. It is not a hearing, but an echo.

Rule 12 of the JQC Rules adopts the Florida Rules of Civil Procedure. This works only against the judge, since he or she is the only one subject to sanctions for violations of the rules. Discovery from the judge must be under oath and binding on the judge, but not so with the JQC itself. Likewise, Rule 14 of the JQC Rules allows only "legal evidence," but this is a limitation on the judge, not the JQC. It does not apply to the Investigative Panel, which has unlimited powers to investigate, nor are members of the Hearing Panel restricted in what other evidence they can consider. Using the rules of civil procedure, the JQC Hearing Panel can and did require a pretrial conference. A pretrial determination of what witnesses will appear and what evidence will be received is inconsistent with an investigation, which entails and open-minded inquiry to obtain all of the information that could be helpful to an adjudicatory body that will later decide the case.[4]

[4] We also note that settlement discussions in this case were reported in writing to the judge of the proceedings (in violation, although apparently only mistakenly and not intentionally, of our agreement with the JQC counsel) in advance of trial, and it was that judge who appeared to have some input into whether the JQC would settle this matter.

We respectfully suggest there has to be a better way, and this Court could initiate reforms to improve it, even it is not held unconstitutional under the Fourteenth Amendment.

CONCLUSION

This proceeding should be dismissed with costs awarded to Judge Baker.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a copy of the foregoing has been furnished by U.S. Mail delivery to *Judge James Jorgenson*, Chairman of JQC Hearing Panel, The Historic Capitol, Room 102, Tallahassee, FL 32399-60000; *Thomas C. MacDonald, Jr., Esquire*, General Counsel to JQC, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; *Brooke S. Kennerly*, Executive Director, Florida JQC, 400 S. Monroe, Old Capitol, Room 102, Tallahassee, FL 32399; *John R. Beranek, Esquire*, Counsel to the JQC Hearing Panel, P.O. Box 391, Tallahassee, FL 32302-0391; and *Charles P. Pillans III, Esquire,* The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202, this 6th day of July, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have complied with the font requirement and used 12-point Courier New.

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